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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted]146

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

versus

LARRY J. ANDRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Franklin Press, Inc. Baton Rouge, La.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No.

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

versus

LARRY J. ANDRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Illinois Central Railroad Company (hereinafter referred to as and simply called "Railroad") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the final judgment and decree in a Civil Action at law by the United States District Court, Eastern District of Louisiana, Baton Rouge Division.

OPINION BELOW

The opinion of the Court of Appeals of the Fifth Circuit is not yet reported and is printed, *infra*, Appendix p. 15 herein.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit affirming the judgment appealed from was entered May 13th, 1959, and is printed *infra*, Appendix, p. 20 herein; the Motion for Stay of Mandate was filed June 1, 1959, and the Order granting the Stay was signed on June 5th, 1959, and is printed *infra* Appendix p. 24 herein.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254, Act of June 25, 1948, c. 646, 62 Stat. 928.

THIS PETITION PRESENTS THE FOLLOWING QUESTIONS OF LAW FOR REVIEW:

1. Can a Railroad Company be held guilty of negligence and liable to a switchman injured in the stopping of a switching operation when the sole evidence in the record shows that the stop was the result of an attack of sneezing suffered by the engineer brought on by outside circumstances beyond the control of the Railroad Company or the engineer operating the switch engine?

2. Is an engineer engaged in switching operations and who suffers from chemical fumes from industrial plants in the area and about to sneeze, knowing he would be unable to see the engine-foreman's flag-down signal and to be sure that he would not run into a string of cars from another switching

track while sneezing and brings his engine to a stop, be guilty of actionable negligence?

3. Are the actions of an engineer in making a stop as a result of an emergency brought on by an attack of sneezing from causes outside of and beyond his control, being those of a normal, reasonable, prudent and experienced person using his best judgment, be an act of negligence?

4. Is not an attack of sneezing suffered by an engineer operating a switch engine an act of nature or of God, that is involuntary, violent and sudden and as a matter of law, decisive on the question of actionable negligence?

STATEMENT OF THE CASE

Larry J. Andre, an employee of the Illinois Central Railroad Company, was one of a crew engaged in switching operations in the "B" yards north of the Standard Oil Company Plant and located between the plants of the Solvay and Ethyl Companies at North Baton Rouge, Louisiana. He was the pin-pulling switchman whose duties were to pull the coupling pin between cuts of cars being switched and kicked onto loading tracks at the Standard Oil Plant and at the time he was injured was working on a string of thirty-four tank cars, eleven of which were to be cut loose and kicked, with twenty-four cars between him and the engine, about 1,000 feet away, and not on the usual, customary or proper side that such switching operations called for, but on the side away from the engineer whom he could not see or be seen by to be able to see the required starting or stopping signals.

As the cars began to move and the couplings loosened, Andre reached in, pulled the pin and placed both hands on the grab-iron next to the running board and with his feet in the stirrup, was reaching from the bottom grab iron for the top grab iron, when he fell to the ground because of the stopping of the slowly moving (3 or 4 miles per hour) switching train and was severely injured. Mr. R. L. Black, the engineer, called as a witness on cross-examination by counsel for Andre, testified as follows:

"Q. Did Mr. Tilton (engine foreman) give you a flag down signal to stop the train?

"A. No Sir:

"Q. Why then, Mr. Black, did you stop the train?

"A. Because of the fact that fumes from the acid fumes and chemicals up around those plants at times would cause your eyes to be burning and watering and then cause you to sneeze and I had to sneeze and my eyes were burning too. So I shut off—put the brakes on to stop because I knew I would not be able to see—at the time I wouldn't be able to see the engine foreman if he did flag me down and I didn't want to take a chance on running into a string of cars."

When asked by the same counsel if he usually stopped his train when about to sneeze, Engineer Black disposed of the question by answering that he did not often sneeze but that under Safety Rule No. 108 of the Illinois Central Railroad Company, he had the right to stop his engine without a signal whenever there might be a case of doubt.

This suit was brought under the provisions of the Federal Employers Liability Act and allegations that the injuries suffered by Andre were caused by the "sole negligence and carelessness of the fellow employees and members of the crew with whom Andre was working, in the following respects:

"1. They failed to give him any warning or signal whatsoever that the train was brought to a sudden or jerking halt.

"2. They caused the train to make a sudden or jerking halt.

"3. In failing to observe his position before bringing the train to a sudden or jerking halt without giving him any signal or warning that same would be done."

Complainant supported these charges of negligence and carelessness of his fellow-employees by the testimony of Engineer Black that he did stop the switching operations of the slowly moving train without warning or signal and which he explained, was caused by and due to the attack of sneezing he suffered resulting from the fumes and chemicals in the switching area.

Defendant Railroad denied that the acts of Engineer Black in the situation and under the circumstances were acts of negligence, either in law or in fact, and charged that Andre was injured solely because of his own negligence and through no fault or negligence of his fellow employees, the members of the switching crew with whom he was working.

The jury awarded Andre Ninety One Thousand ($91,000.00) Dollars on November 20, 1957, and on November 29,

1957, Railroad filed its motion to set aside the verdict and for a new trial and, in the alternative, for a remittitur of an amount commensurate with the evidence of the injuries suffered by Andre, and, again, on February 11, 1958, filed a further motion for a remittitur. On May 9, 1958, the District Trial Judge granted Railroad a new trial unless Plaintiff agreed to enter a remittitur of Twenty-one Thousand ($21,000) Dollars, upon which, on June, 1958, Plaintiff filed his remittitur in that amount, thus avoiding a new trial and judgment was then entered for Seventy Thousand ($70,000) Dollars.

Railroad took and perfected its appeal to the Fifth Circuit Court of Appeals, filing its supersedeas bond and, on May 13, 1959, that Court affirmed the judgment in an opinion forming a part of the record transmitted herewith and upon which this writ of certiorari of Railroad is based.

REASONS FOR GRANTING THE WRIT

Your Honors should grant writs of certiorari and judicially recognize and correct the error of the Fifth Circuit Court of Appeals which failed, in accordance with the mandate of this Court as set forth in *Erie Railroad Company v. Tompkins*, to follow and conform with the established definitive jurisprudence of the Appellate Courts of Louisiana as exemplified in the decisions in *Snodgrass v. Centannic*, 229 Louisiana 915, 87 Southern 2nd 127, and the citations therein contained, as hereinafter set forth.

The writs herein applied for should be granted as there is a serious conflict in the jurisprudence established by the Fifth Circuit Court of Appeals and exemplified in this present case and that established by the Court of Appeals for the District

of Columbia and exemplified in *Moore v. Capital Transit Company*, 226 Fed. 2nd 57, and *Cohen v. Petty*, 65 Fed. 2nd 820, and the citations therein contained, as hereinafter set forth.

Your Honors should grant writs of certiorari and judicially recognize and correct the error of the Fifth Circuit Court of Appeals in this case in failing to find and hold that the Railroad was not guilty of an act of negligence when the sole evidence in the record shows that the stopping of the switching operations was caused by and the result of an attack of sneezing suffered by the engineer and brought on by conditions and circumstances outside of and beyond the control of the Company or the engineer.

The Appellate Court is in error in saying and holding that: "The fact that a sneeze is involuntary, violent and sudden, **is not decisive of the question.**"

* * *

Sneezing, or sternation—as it is medically known—is defined in *Dorland's Medical Dictionary* as an act of forcibly and spasmodically expelling air through the nose and mouth and usually results from irritation of the nasal mucara by dust, gases and other substances. It is an allergic reaction, according to Lowenberg in his "Medical Diagnosis" (p.94) and is **"involuntary, sudden, violent** and **audible."**

Yater, in his "Symptom Diagnosis" text asserts that, among other causes, it may be produced by a great variety of substances inhaled into the nose, such as dust, smoke, gas fumes, etc. and does produce a **temporary involuntary muscular action or reaction**, which varies in degree according to the severity of the sneeze.

Encyclopaedia Brittanica, (1957 Edition), page 853, defines:

> "Sneezing, a **violent** expiration of air from the nose and mouth; it is an **involuntary reflex respiratory act**, caused by irritations of the nerve endings of the mucous membrane of the nose or by stimulations of the optic nerve by a bright light." (Emphasis ours)

The New Century Dictionary, Volume 2, page 1753, defines a sneeze as:

> "To emit air or breath **suddenly, forcibly** and **audibly** through the nose and mouth by **involuntary spasmodic action.**" (Emphasis ours)

Webster's *New Dictionary*, Page 703 Concise Ed. 1956, says:

> "Sneeze. To make a **sudden, violent, spasmodic** and **audible expiration of breath.**" (Emphasis ours)

There can be no dispute in fact or in law, by common knowledge or by medical and dictionary definitions, that an attack of sneezing is involuntary, sudden and violent and any individual or judge by his own personal experience and of his own knowledge knows that a sneeze accompanied by burning and watering of the eyes renders one temporarily and involuntarily and suddenly unable to see or have proper control of muscular power and results in immediate suspension of any action or activity that requires the normal use of the senses.

And, if one, like Engineer Black, is charged with the control of a locomotive engine, switching a cut of tank cars, and is suddenly and unexpectedly afflicted by acid fumes and

chemicals from plants in the area of his operations, resulting in causing his eyes to burn and water and causing him to sneeze, a situation brought on by outside circumstances, beyond and outside his control or that of his employer, and at such a time and in such a situation, reacts as a normal, reasonable prudent and experienced engineer, using his best judgment and stops his switching operation to avoid what he thought would present a serious switching mishap, has neither in law nor in fact committed an actionable act of negligence.

The spreading of the acid fumes from the switching area plants was beyond the control of Railroad or any of its employees. It was by an act of God or of nature or of both and:

> ". . . it was a manifestation of the forces of nature which man cannot resist. The fact that no human agency can resist an Act of God renders misfortune occasioned solely thereby a loss by inevitable accident which must be borne upon whom it falls." (38 American Jurisprudence, 649)

Faced by the emergency of burning and watering eyes and having to sneeze, a situation that all the definitions call involuntary, violent and sudden, Engineer Black made a sudden stop of his slowly moving switching operations and:

> "The prudence and propriety of an action are not to be judged by the event, but by the circumstances under which it was done. The rule is, as stated generally, that one who, in a sudden emergency, acts according to his best judgment, or who, because of the want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence provided he exercised' in the emergency the care of a reasonably prudent individual under like circumstances. The fact that injurious consequences might have been avoided had

he selected another course, does not charge him with negligence." (38 American Jurisprudence, 686.)

The general rule, is stated by *Corpus Juris Secundum* (Vol. 65, p. 408, et seq.) to be:

> "One confronted with a sudden emergency is not held to the same accuracy of judgment as would be required of him if he had time for deliberation; and, if he exercises such care as an ordinarily prudent man would exercise when confronted by a like emergency, he is not liable for an injury which has resulted from his conduct, even though another course of conduct would have been safer, or even might have avoided the injury, as **under such circumstances, the injury is regarded as the result of an inevitable accident.**"

The Supreme Court of Louisiana (*Snodgrass v. Centannie*, 87 So. 2d 127, March 26, 1956) quotes both of the two above from both *American Jurisprudence* and *Corpus Juris Secundum*, and says:

> "The rule is well stated in Corpus Juris Secundum that when a person exercises care and caution in an emergency which an ordinarily prudent man would have used under the same or similar circumstances, he is not negligent merely because he fails to exercise the best judgment or does not take the safest course or does not take every precaution which, from a careful review of circumstances, it appears he might have taken. * * * The law does not require such a choice as, under all known or obvious circumstances, a reasonably prudent man might make. A person is by no means held to the same judgment and activity under all the circumstances. The opportunity to think and act must be taken into consideration in determining whether due care was exercised in making a

> choice between methods or courses of conduct. The fact that one acts in the stress of an emergency or sudden peril not due to his own act or omission justifies conduct that would otherwise be regarded as negligent."

These sound principles of law have been applied to cases involving street cars, airplanes and automobiles and they fit and apply as well in emergency and unexpected situations arising in a railroad switching operation.

In *Chapman, et ux v. United States*, 194 Fed. Rep. 2d 974, the Court of Appeals for the Fifth Circuit had before it a suit for the recovery of damages arising out of the death of a passenger in a crash of an airplane of the United States Air Force in which the pilot and all others in the plane were killed. The basis of the suit was the negligence of the pilot. Among the specifications on the appeal was that the lower court erred in excluding from evidence the Army Air Force Board's report of the accident investigation which set forth the Board's opinion that the pilot just before the crash occurred exercised poor judgment and technique.

Chief Judge Hutcheson was the organ of the Court, with no dissent, in sustaining the trial court, saying:

> "Since we cannot know the facts, and conjecture may not serve as proof of them the *post hoc* armchair speculations of the report, if admitted in evidence, may not serve as such. Nor may we, on the basis of these forbidden substitutes for evidence, conclude that the district judge made a clear error in finding no negligence and that his judgment refusing to convict the dead pilot of wrong doing without evidence and to require the United States to stand in damages was wrong and must be reversed. Indeed, we think the evidence standing as it does, that a

finding that the pilot was negligent, and the United States was liable, would do great violence to the evidence and to the law governing those who, finding themselves in the emergency of swift and dire peril, brought about by no fault of their own, adjust themselves to it as best they can and fight a brave and unremitting fight to the bitter end.

"It would be difficult, we think, to find a case more demanding of the application of these controlling legal principles than this one presents. As stated and supported by full authority in 38 Am. Jur., **'Negligence,'** Sec. 41 **'Acts in Emergency or Sudden Peril,'** at page 686: 'The propriety and prudence of an action are not to be judged by the event but by the circumstances under which it was done. The rule, as stated generally, is that one who, in a sudden emergency, acts according to his best judgment, or who, because of want of time, in which to form a judgment omits to act in the most judicious manner, is not chargeable with negligence. * * * The fact that injurious consequences might have been avoided had he chosen another course of conduct does not charge him with negligence.'

"Or, as the rule is stated on page 687: '* * * the sound view appears to be that one who through no fault of his own, is confronted with a sudden peril and does things which afterward may seem to have been improper or foolish is not negligent if he does what a prudent man would or might do under the circumstances."

In *Moore v. Capital Transit Company* (226 Fed. 2d 57, Sept. 8, 1955), the United States Court of Appeals for the District of Columbia Circuit held:

"There is no need for us to remand the case for a new trial if the judgment n.o.v. was properly entered. We hold that it was under the authority of Cohen v. Petty, 62 App. D.C. 187, at page 188, 65 F. 2d, 820, at page 821, where Judge Groner said:

"'It is undoubtedly the law that one who is suddenly stricken by an illness, which he had no reason to anticipate, while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence. Armstrong v. Cook, 250 Mich. 180, 229 N.W. 433; Slattery v. Haley, Dom. Law Review, 1923 (3), p. 156.'"

In *Cohen v. Petty* (65 Fed. Rep. 2d 820), quoted from the above opinion that Court further said:

"In the present case the positive evidence is all to the effect that defendant did not know and had no reason to think he would be subject to an attack such as overcame him. Hence, negligence cannot be predicated in this case upon defendant's recklessness in driving an automobile when he knew or should have known of the possibility of an accident from such an event as occurred. * * * Even if plaintiff's own evidence tended more strongly than it does to imply some act of negligence, it would be insufficient to sustain a verdict and judgment upon proof such as defendant offered here, of undisputed facts, for in such a case the inference must yield to uncontradicted evidence of actual facts."

The record here shows nothing to disprove the statement of Engineer Black that he suffered from an unexpected watering and burning of his eyes from acid fumes and chemicals in the area that caused him to sneeze and his answers to questions from counsel of plaintiff shows that he had no reason to think he would be subject to such an attack as overcame him:

"Q. Mr. Black, do you usually stop the train when you are about to sneeze?

"A. I don't often sneeze."

We come squarely under the rules as they have been defined by our Federal and State courts and, as a matter of law, the Court of Appeals for the Fifth Circuit was in error in not recognizing and holding that the actions of the engineer who suffered from an attack of sneezing brought on by outside circumstances beyond his control or that of Railroad employer was not such as to make Railroad guilty of negligence and liable to switchman Andre.

The fact that Engineer Black did so sneeze and that a sneeze is involuntary, violent and sudden is legally decisive of the question and is the basis of this application for a writ of certiorari which should be granted so that this court can review and then reverse the judgment of the Court of Appeals.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writs of certiorari should be granted and that the judgment of the Court of Appeals, Fifth Circuit, should be reversed.

Respectfully submitted,

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Attorney for Petitioner

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Appendix A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,434

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

versus

LARRY J. ANDRE,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 13, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: The appellee, Larry J. Andre, was at the time of the event here related, and for twelve years had been, a switchman in the employ of the appellant, Illinois Central Railroad Company. On the afternoon of April 8, 1954, he was one of a crew of five engaged in switching tank cars

to industrial sidings in North Baton Rouge, Louisiana. During such a switching movement, the assignment of one of the switchman, sometimes referred to as a pin-puller, is to pull a coupling pin so as to uncouple and permit the separation from the train of the cars which are to be cut out and kicked onto the siding of a shipper for loading. The pin-pulling operation is to be performed while the train is slowly backing, after which the pin-puller is to mount the side of a car. When the train attains a momentum of six to eight miles per hour the engineer, upon a flag-down signal from the engine foreman, should apply the brake so as to stop the engine and the forward section of the train and to cause the uncoupled cars to be cut away and move onto the loading track of the shipper. The appellee was the pin-pulling switchman of the crew at North Baton Rouge. He was working on the fireman's side of the train although it was customary for the pin-puller to work from the engineer's side. There was evidence from which it might have been found that the appellee, in violation of a safety rule of the appellant, did not have firm hand and foot holds during the uncoupling operation. Eleven cars of a thirty-four car string were to be cut loose and kicked onto a loading siding. The appellee had pulled the pin and was in process of securing his hold upon the grab iron on the car when the engineer brought the train to a sudden stop. The jerk of the stop threw the appellee from the train and under it. He was severely injured. After three years of incapacity he sought reemployment from the railroad. It concluded that he was not physically able to resume his duties as a switchman. It did hire him as a fireman. He lost his seniority and the regularity of employment incident to it. Suit was brought by the appellee against the railroad under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. The appellee

charged that his injuries resulted from the appellant's negligence in bringing the train to a sudden and jerking halt without observing his position and without giving him any warning. The appellant denied negligence. **It claimed, and the engineer testified, that because of chemical fumes from industrial plants in the area the engineer was about to sneeze, and, knowing he would be unable to see the engine foreman's flag-down signal while sneezing, and to be sure he would not run into a string of cars from another track while sneezing, he came to a sudden stop.** The appellant asserted that the appellee was negligent in that he was not in a safe place and position as required by its operating rules, that he should have expected a sudden stop at any time, and that the injury to the appellee resulted solely because of his own negligence. On these issues the case was tried. The court instructed the jury on the question of the care required on the part of the engineer and on the part of the appellee. The court charged that if there was negligence of another employee which caused the accident, but that if the negligence of the appellee contributed to the cause of the accident, his negligence should be considered as grounds for reducing or diminishing any award of damages. No charge was given or requested which related to the effect of sneezing as justifying conduct which might otherwise be negligent. The jury returned a verdict for the appellee in the amount of $91,000. Judgment was entered on the verdict. The appellant filed a motion for a new trial and in the alternative for a remittitur. The court entered an order granting a new trial unless a remittitur of $21,000 be entered. The remittitur was entered and the amount of the judgment is now for $70,000. On appeal it is urged that there was no negligence in the sudden stopping of the train by the engineer in anticipation of an attack of sneezing, that

the appellee was injured through his own negligence and that the verdict was excessive.

The case was submitted to the jury on instructions which amply stated the law as to negligence, contributory negligence and damages. These instructions are not here questioned. **The fact that a sneeze is involuntary, violent and sudden is not decisive of the question. It was the** violent and sudden stopping of the train which was asserted to be negligence of the appellant. The question was for the jury. See *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 524, 559, 77 S. Ct. 443, 459, 478, 1 L. Ed. 2d 493, 515, reh. den. 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764. The question as to the violation of the appellant's safety rule by the appellee was properly in the case. But whether it was a cause of the injury, and if so whether the sole or a contributing cause, and if the latter, the extent of the contribution were properly treated as questions for the jury. *Rocco v. Lehigh Valley Railroad Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743; *Chicago & N. W. Ry. Co. v. Garwood*, 8th Cir. 1948, 167 F. 2d 848; *Atchison, T. & S. F. Ry. Co. v. Ballard*, 5th Cir. 1940, 108 F. 2d 768, reh. den. 109 F. 2d 1012, cert. den. 310 U. S. 646, 60 S. Ct. 1096, 84 L. Ed. 1413. If there was negligence on the part of the appellant and that negligence played any part in producing the injury the appellee should recover. *Rogers v. Missouri Pacific Railroad Co., supra.*

We cannot say that th amount awarded to the appellee, as reduced by the remittitur, is excessive. The injuries were, and the appellant so admits, severe and painful. He was completely disabled for nearly three years. He has a partial disability that will be continuing and result in a substantial reduction in his future earnings. We find nothing here that

requires us to set aside the award of damages. *Ohio Casualty Insurance Co. v. Brown*, 5th Cir. 1957, 241 F. 2d 795; *Travelers Insurance Company v. Stanley*, 5th Cir. 1958, 252 F. 2d 115.

The judgment appealed from is

AFFIRMED.

Appendix B

JUDGMENT

Extract from the Minutes of May 13, 1959.

ILLINOIS CENTRAL RAILROAD COMPANY,

No. 17454

versus

LARRY J. ANDRE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Illinois Central Railroad Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Appendix C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,454

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

versus

LARRY J. ANDRE,
Appellee.

MOTION FOR STAY OF MANDATE

TO THE HONORABLE THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Defendant-Appellant, Illinois Central Railroad Company, respectfully present, this, their application for, and move the Court, to enter an Order staying the issuance of mandate in this case, under the provisions of Section 2101 (f) Title 28, United States Code, and pursuant to Rule 32 of the Rules of this Court, because it is the bona fide intention of said Appellant to make proper and timely application to the Supreme Court of the United States for a writ of Certiorari.

The grounds upon which said petition for Certiorari will be based are substantially as follows:

That the decision of the Court of Appeals for the Fifth Circuit is in error in holding that the action of the engineer

in making a sudden stop of the slowly moving switch engine and cut of cars, due to a violent, involuntary and sudden fit of sneezing was not decisive on the question of negligence and in not finding and holding that as a question and matter of law as well as in fact, the actions of the engineer in the sudden emergency, being those of a normal, reasonable, prudent and experienced person using his best judgment under the circumstances, was not an act of negligence even though another course of conduct would have been safer or even might have avoided the injuries to Plaintiff-Appellee.

Appellant further shows that it executed as Principal with proper surety and there is of record and in full force and effect in these proceedings, a cost and supersedeas bond in the principal sum of SEVENTY FIVE THOUSAND AND NO/100 ($75,000.00) DOLLARS conditioned on its paying the amount of whatever final judgment herein together with all interests and costs that may be awarded and therefore no further bond or security is required from Appellant pending final decree in these proceedings.

WHEREFORE, Appellant moves the Court for an Order staying the issuance of mandate herein pending the filing by Appellant of a petition for certiorari in the Supreme Court and until final dispositions therein of this case.

In support hereof, Appellant attaches the statement of Counsel.

(s) H. PAYNE BREAZEALE
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Attorney for Defendant-Appellant

I hereby certify that it is the bona fide intention of the Illinois Central Railroad Company, Defendant-Appellant, to make application to the Supreme Court of the United States for a writ of Certiorari within the time provided for by law and that I believe that there is merit in its case and that the judgment of the United States Court of Appeals, Fifth Circuit, ought to be reviewed by the Supreme Court of the United States.

I further certify that a copy of this applicatiton has been mailed, postage prepaid, to Mr. Leon Hebert and Mr. Percy J. Landry, of Hebert and Landry, Attorneys for Plaintiff and Appellee, Larry J. Andre, 118 St. Louis Street, Baton Rouge, Louisiana.

June 1, 1959.

(s) H. PAYNE BREAZEALE
Attorney for Defendant-Appellant

Appendix D

ORDER STAYING MANDATE FILED: JUNE 5, 1959

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,454

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

versus

LARRY J. ANDRE,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States; IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-

mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 5th day of June, 1959.

(s) WARREN L. JONES
United States Circuit Judge.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted]

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

versus

LARRY J. ANDRE,
Respondent.

BRIEF IN OPPOSITION TO THE APPLICATION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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In accordance with Rule 24, Larry J. Andre, respondent, opposes the granting of writ of certiorari applied for by the Illinois Central Railroad Company for the following reasons.

1. Applicant has not demonstrated any grounds under Rule 19 of this Court, particularly the questions of law allegedly presented for determination, because the Trial Court adequately instructed the jury on all pertinent

law applicable to the factual situation under consideration and the questions as presented in the application, pages 2 and 3, are in truth a simple request for the reversal of facts found by the jury which constituted acts of negligence on the part of the applicant.

2. The dissatisfaction with the finding of facts by the applicant can in no way convert factual matters into questions of law which have not already been settled by this Court, nor has there been any showing that either the Trial Court or the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure, as to call for the exercise of the power of the Supreme Court of the United States to supervise lower courts.

REASONS FOR DENIAL OF WRIT.

Without dissent, the Circuit Court of Appeals affirmed the opinion of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, granting a verdict for respondent, Larry J. Andre, in the sum of $70,000.00. The opinion was short, brief and concise covering all points raised by the applicant, citing all pertinent and applicable cases relied upon.

The Lower Court in deciding that all matters appealed from were questions of fact for the jury, found that the case had been submitted to that jury on instructions which amply stated the law as to negligence, contributory negligence and damages. It found, in addition, that the amount awarded for the injuries received by the respondent was not excessive and, therefore affirmed the action of the District Court.

The record not only supports the conclusions of the Circuit Court in all respects, but the absence of motions for a directed verdict by the applicant in the District Court and the absence of any objections to the instructions on which the case was submitted is most significant. There were in fact no errors committed by the District Court on which to ground the original appeal, let alone this application for writ of certiorari to determine what the applicant calls "questions of law", but which are truly questions of fact which were answered by the jury.

In citing *Snodgrass v. Centannie*, 229 La. 915, 87 So. (2d) 127, as being the established definitive jurisprudence in Louisiana in regard to negligence, applicant overlooks entirely that in the instant case the Trial Judge adequately instructed the jury which found the facts on which the verdict of negligence was rendered on all matters of proximate cause and negligence. Applicant did not request special instruction based on the case of *Snodgrass v. Centannie*. Moreover, the absence of any objections to the thorough instructions given by the Trial Court leads but to one conclusion, to-wit, that the applicant was satisfied that the judge had instructed the jury adequately and thoroughly on the law applicable to this case.

The *Snodgrass* case, *supra*, merely holds that when a person finds himself in an emergency and exercises care and caution which an ordinarily prudent person would have used under the same or similar circumstances, he is not negligent because he fails to exercise the best judgment or does not take the safest course. The jury considered these matters and refused to declare that a person **about to sneeze** was confronted with a sudden emergency.

It determined that the engineer did not act or use the same caution as a reasonable prudent person would be expected to use under the circumstances. These factual matters having been determined by the jury, the Court of Appeals for the Fifth Circuit found that they had been properly considered and refused to reverse the verdict for lack of any errors in the record.

The conduct of the Engineer, Black, does not fall within the description of conduct dealt with in *Moore v. Capital Transit Company*, 226 Fed. (2d) 57, and *Cohen v. Petty*, 65 Fed. (2d) 820. The record is silent that Engineer Black ever sneezed. He stated:

> ". . . and I had to sneeze and my eyes were burning too. So I shut off—put the brakes on to stop because I knew I would not be able to see—at the time I wouldn't be able to see the engine foreman . . ."

Being about to sneeze does not constitute a sudden illness which absolves one from his negligent acts. The jury considered that question under ample instructions concerning the law. The applicant, which in the District Court, did not request special instructions based on the cases of *Moore v. Capital Transit Company* and *Cohen v. Petty, supra*, nor did the applicant request any special instructions to the effect that a sneeze would absolve one from his otherwise negligent conduct. As one of the judges of the Court of Appeals so aptly put it during oral argument, nothing prevented the engineer from asking the fireman to take over when he felt the sneeze coming on.

The case of *Chapman, et ux., v. United States*, 194 Fed. Rep. (2d) 974, is inapposite here for the reason that the matter there considered was the exclusion from evidence of the Army Air Force Board's report of the accident investigation which set forth the Board's opinion that the pilot had exercised poor judgment and technique immediately prior to the crash. In this case, the conduct of the engineer was not the subject of conjecture and guessing; the engineer's own testimony tells us what happened. Having heard it, the jury concluded that he did not act prudently.

So, then, the contention that a conflict exists in the jurisprudence in the Fifth Circuit in this case and the decisions in *Moore v. Capital Transit Company* and *Cohen v. Petty*, evaporates under closer scrutiny. No jury has ever been more completely instructed concerning due care and proximate cause than the jury which found the engineer to be negligent. Having failed to move for the directed verdict and having failed to demonstrate any error either in the judgment of the Lower Court or the opinion of the Circuit Court of Appeals, the applicant has done the last thing available to it, namely, to suggest a conflict in the jurisprudence where no actual conflict exists.

The Trial Judge's instructions to the jury covered all of the questions which allegedly form the basis for the petition for certiorari. In the language of the Trial Judge appearing on pages 280 and 282 of the Transcript, the conduct of the engineer presented as a question for determination by the jury:

> "In other words, when you consider the conduct of the engineer and also the actions of the plaintiff

or the actions of any other of the crew, as a fair standard we ask, what conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances. Our answer to that question gives us the criterion by which to determine whether or not the evidence before us proves negligence." (Tr. p. 282.)

The jury found Engineer Black negligent thus leaving no unanswered questions which can be rephrased as the basis for a writ of certiorari as questions of law.

We believe that there are no questions of law upon which this Court should grant a writ of certiorari and that the applicant seeks this writ in the hope and expectation that it ultimately be granted a new trial so that another jury of reasonable men viewing the same facts might reach a different conclusion.

CONCLUSION.

For the reasons above set forth, respondent prays that the petition for writ filed by the Illinois Central Railroad Company should be denied.

Respectfully submitted,

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